No “Censor for the World”

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Will the internet become a “worldwide censorship machine”? Has the “risk that a single EU court within a single EU member state would become the censor for the world” been realized? Not quite. Much of the critique of the recent Austrian Supreme Court ruling *Glawischnig-Piesczek/Facebook Ireland Limited* (OGH 15.09.2020, 6 Ob 195/19y) is based on a wrong reading of the law and policy behind the judgment.

Factual and Legal Background

The proceedings have been going on for a while: In 2016, a Facebook user published an article on the platform which included a picture of Eva Glawischnig-Piesczek, the former leader of the Austrian Green Party. The Facebook user commented on the article with an offensive statement, referring to Glawischnig-Piesczek as a “lousy traitor” (“*miese Volksverräterin*”), “corrupt oaf” (“*korrupter Trampel*”) and a member of a “fascist party” (“*Faschistenpartei*”).

Since Facebook refused to remove this comment, Glawischnig-Piesczek filed for an injunction due to violation of §78 öUrhG (i.e. the Copyright Act, because a picture of her was included) and § 1330 öABGB (para. 1: “If someone has been caused real harm or loss of profit by insulting [their] honor, [they are] entitled to demand compensation”). Glawischnig-Piesczek alleged false statements of fact (“corrupt”, “fascist party”), made in a way and under circumstances that would cause the average reasonable Austrian to take them seriously.

What some commentators, especially with a US background, do not appreciate is that German words like “*Faschist*” have narrower semantic fields than their English counterparts. Accusing Glawischnig’s party, the Greens, of fascism, the Vienna Commercial court held, was a factual statement.

At the Commercial Court

In opposition to Glawischnig’s motion, Facebook argued that the company was a hosting provider within the meaning of § 16 ECG – the E-Commerce Act which transposes the EU E-Commerce Directive (ECD) into Austrian law – and therefore subject to the immunities provided therein. The company, Facebook argued, should not be a party to this lawsuit in the first place. The court disagreed. Facebook was accused of not having removed the post after the problem had been specifically pointed out to it in a letter from Glawischnig-Piesczek’s lawyers. In December 2016, the trial court ordered Facebook to delete the post at issue and any recognizable future reposts. Specifically, Facebook was ordered to delete any and all posts that (1) include a picture of Glawischnig and (2) accuse Glawischnig of being corrupt, a

Fascist, a "*Volksverräterin*," or any combination thereof (HG Wien 07.12.2016, 11 CG 65/16 w 17, p 1).

The order did *not specify any particular geographic scope*. This means that the injunction was meant to apply in all of Austria but nowhere else. Firstly, countries do not, as a general rule, claim remit to provide injunctive relief beyond their borders. An Austrian injunction that enjoins foreigners from causing harm on foreign soil is a departure from standard practice that at the very least needs to be made explicit. Secondly, it is settled case-law that an Austrian court cannot extend the geographical application of a judgment unless the plaintiff expressly asks it to do so (OGH 30.03.2020, 4 Ob 36/20b, pp 3-4). Glawischnig-Piesczek did not request any scope other than Austrian as a matter of record.

The trial court did not feel the need to limit the order to Austria because the order being limited to Austria was the obvious, intuitive default.

The first appeal

Facebook appealed the injunction. § 16 ECG requires hosting providers to remove material they know infringes the law, but case-law has made it clear that this obligation only exists if the infringement is obvious to the legal layperson (OLG 05.05.2017, 5 R 5/17t, pp 5, 14). This was not the case here, Facebook claimed (p 7). Infringements of the Copyright Act are a special case as a matter of statute, the appellate bench replied: according to § 81 (1a) UrhG, a provider cannot plead ignorance of the law in Copyright Act cases if it has been served with a formal warning (pp 14-17).

In case the order was not going to be lifted, Facebook requested that it be narrowed. Firstly, Facebook pointed out that the injunction enjoined the company to remove not just the original post and any verbatim reposts but also any other new posts that paraphrased or otherwise restated the original. The company could set up filters to catch exact reposts but could not be expected to catch any and all new comments that were just vaguely comparable. The court concurred (pp 1-2, 17-21).

Secondly, the injunction *should be limited to comments submitted from within Austria*. This the court declined (p 21). This important exchange is difficult to parse without access to the lawyers' internal notes, but it appears as though Facebook and the court were talking at cross purposes here. What Facebook should have asked for, and probably meant to ask for, is narrowing the injunction to posts *accessible from* (and not *submitted* from within) Austria. Austria's claim to jurisdiction and Austria's choice to apply Austrian law are both based on the fact that Austria is a country in which the material alleged to be defamatory is available to be read, and therefore the place of impact. Facebook is not liable in Austria for content that does not 'exist' (i.e. can be seen) in Austria.

The second appeal

Both parties appealed this decision to the Supreme Court (OGH). Glawischnig-Piesczek asked for the injunction to be restored to its original state: Facebook should be required to delete not just any new comments reproducing the original comment exactly but *also any new comments merely paraphrasing it*. Facebook conceded that the trial court was correct to order the removal of the original comment but reiterated that the company should not be enjoined to engage in any proactive monitoring of future comments.

It is worth noting that Facebook no longer alleged the injunction was of "global scope", either in its original or in its amended form. The Supreme Court acknowledged that Facebook had in fact barred the original comment from being accessed in Austria, apparently through some form of geoblocking. The Supreme Court tacitly accepted the geoblocking as compliance, thus confirming once again that no takedown "on a global scale" had been demanded at any stage (OGH 25.10.2017, 6 Ob 116/17b, pp 3-4).

A can of worms for Luxemburg

The Supreme Court held that an injunction covering material of "equivalent meaning" is permissible and in fact desirable under settled case law (pp 11-12). The bench felt uncertain, however, whether such an injunction was compatible with the prohibition on general monitoring in Art. 15 (1) ECD and asked the CJEU for a preliminary ruling.

National courts have wide discretion to aim for broad decisions (CJEU 16.12.1981, C-244/80). However, the Supreme Court chose to make very liberal use of this discretion and test essentially every conceivable kind of injunction, including a hypothetical injunction applying "worldwide". It is not obvious why the Supreme Court opened this particular can of worms as global application had, as we have discussed, not been at issue previously.

In 2019, the CJEU stated that worldwide take-down orders do not contradict the ECD (CJEU 03.10.2019, C 18/18; see here on the CJEU's reasoning). However, the CJEU mentioned that national courts have to make sure that the worldwide injunction does not interfere with international law.

Overlooked: The OGH decision in ORF/Facebook

The Austrian Supreme Court relied on the CJEU's ruling for the first time in its *ORF/Facebook* judgment earlier this year (*ORF/Facebook Ireland Limited*, OGH 30.03.2020, 4 Ob 36/20b). Therein, it interpreted the CJEU judgment to mean that national courts had to take into account internationally recognized legal principles when deciding about the worldwide effect of removal orders (paras 5.2 and 5.5).

These considerations of the Austrian Supreme Court are a good representation of the CJEU's reasoning. What is surprising is that the Supreme Court read the CJEU judgment to mean that the ECD, while leaving the ultimate decision to national courts, generally intended removal orders to have a worldwide effect (paras 5.2 and 5.5). There is no clear evidence for this claim in the CJEU judgment.

As the specific case at issue regarded copyright infringement, the Austrian Supreme Court concluded that the principle of territoriality was applicable: "*[T]he copyright claim, like other intellectual property rights claims, is not global in scope, but is limited territorially. However, this does not apply to the protection of personal rights. Such rights are in general not territorially limited […]*." (para 5.3).

Overinterpreted: The OGH decision in Glawischnig-Piesczek/Facebook

The Austrian Supreme Court's judgment in *Glawischnig-Piesczek/Facebook* differs from the *ORF/Facebook* case as it is not about copyright infringement, but about Glawischnig-Piesczek's personality right not to be defamed through untrue and offensive online content. According to the Supreme Court's *obiter dictum* in *ORF/Facebook*, personality rights *generally* do not have territorial limitations.

The Supreme Court, however, decided to take the "easy way out" in this case: only two sentences of the 15-page ruling deal with the question of worldwide applicability:

> "The appellate court rejected [Facebook's] plea in the appeal to restrict the injunction to Austria, which – under consideration of certain conditions – can also quite meet the position of the ECJ in its judgement C-18/18. Whether that is actually the case in this proceeding can […] remain open because the defendant [Facebook] in the revision appeal proceedings did not refer to the question again."

Thus, the Supreme Court touches on the topic of worldwide applicability of personality rights very cautiously, seemingly trying to avoid setting a(nother) precedent. Specifically, the Supreme Court reinstated the decision of the court of first impression which, let us recall, did *not specify any particular geographic scope*. The reinstated injunction was meant to apply in all of Austria but nowhere else. The Supreme Court stated that (in theory) it might well be compatible with the CJEU's *Glawischnig-Piesczek* judgment to give worldwide effect to the injunction. However, it was not necessary to consider this matter since Facebook had not brought it up before the Supreme Court.

No global censorship

The decision on the injunction therefore does not lead the way to "worldwide censorship". It does not even serve as a good precedent for the worldwide applicability of removal orders in defamation cases. As this is only a decision on the

injunction, the question is likely to be discussed again in the main proceedings of the case.

In addition, as two Austrian commentators, Michael Otti and Nikolas Raunigg, remind us, the decision will in any case not be too "useful for despots". After all, the actual power of judgments lies in the recognition and enforcement of the decision. Within the EU, as Otti and Raunigg note, such a framework exists. In Ireland, where Facebook's European subsidiary is headquartered, the Austrian Supreme Court's decision can be enforced. But the decisions of courts from authoritarian states cannot be enforced quite so easily. National courts could after all refuse to enforce injunctions by reference to violations of *ordre public*.

While it is understandable that human rights campaigners use this judgment as a wake-up call in the important fight for human rights protection online, it is unfortunate that the narrative of national courts imposing takedown duties on platforms without respect of borders is amplified uncritically. We need the necessary nuance and – ideally – some knowledge of the local substantive and procedural law. After all, let's not have "the despots" get ideas.
